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No. .....

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

WOO CHIN TONG,

Petitioner,

vs.

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a murder prosecution where the defense of involuntary manslaughter is both requested in instructions and amply justified by the evidence, can the State hold that the jury cannot consider the defense unless the evidence stated from a position most favorable to the prosecution substantially supports such a finding?

Can a conviction be upheld where even the State of California acknowledged that the prosecutor committed prejudicial misconduct by telling the jury that the defendant belonged to a Chinese youth gang and similarly acknowledged that one of the jurors in the case received highly damaging evidence which she was not entitled to hear while serving in the capacity of alternate juror and thereafter took the evidence to the deliberation room?

PARTIES TO PROCEEDING

The only defendant in this matter, and the petitioner herein, is WOO CHIN TONG.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Woo Chin Tong, the only party to this proceeding, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, filed February 28, 1983.

OPINIONS BELOW

The trial below was by jury. The decision of the Court of Appeal of the State of California, Second Appellate District,

affirming the judgment is contained in Appendix "A" hereto. A Petition for Rehearing was presented and denied (Appendix "B"). A timely Petition for Hearing was denied by the Supreme Court of the State of California on May 19, 1983, and a copy of the post card notice thereof is contained in Appendix "C".

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Fourteenth Amendment:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United states and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any state deprive any person of life, liberty, o property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On September 12, 1980, an Information was filed in the Superior Court in and for the County of Los Angeles alleging that the defendant, Woo Chin Tong, on June 28, 1980, murdered Ralph Chew in violation of California Penal Code § 187 (Clerk's Transcript 1 [hereinafter C.T.]). He was additionally charged with using a firearm during the commission of the offense, in violation of California Penal Code §§ 12022.5 and 1203.06 (C.T. 1, 17). He pled not guilty to the above charges (C T. 2). Motions for discovery, disclosure of the informant's identity and disclosure of police personnel records, to suppress the products of his illegal arrest and his "confession" were made prior to trial (C.T. 36). Since the defendant was born in Hong Kong and spoke only passable English, various interpreters were used throughout the pre-trial and trial proceedings.

On April 14, 1981, a jury trial commenced before the Honorable Robert Roberson, Jr., Superior Court Judge, which culminated in a finding of guilty on May 6, 1981, of second degree murder, with the armed and use allegations found to have been proved (C.T. 107-08). The matter was then referred to the Probation Department and a report was prepared for the trial court. On July 15, 1981, the defendant was sentenced to the State Prison for the term prescribed by law for second degree murder, namely, fifteen years to life, plus an additional

two years for violations of Penal Code §§ 12022.5 and 1203.06 (C.T. 110). Although the defendant had been at liberty during trial, his bail was revoked upon conviction and bail on appeal was denied, so that the defendant remains in custody (C.T. 110). A Notice of Appeal was timely filed on September 2, 1981, and on February 28, 1983, the Second Appellate Court of Appeal, Division Three, found errors had been committed but, nevertheless, affirmed the decision (Appendix "A"). A Petition for Rehearing was timely filed with said court on March 15, 1983, and was denied on March 30, 1983 (Appendix "B"). The case was then presented to the California Supreme Court in the form of a Petition for Hearing. (Rule 28(b).) On May 19, 1983, the Petition for Hearing was denied (Appendix "C"). This Petition for Writ of Certiorari is invoked pursuant to 28 U.S.C. § 1257(3).

STATEMENT OF FACTS

Initially, petitioner concedes that the Court of Appeal's rendition of the "facts" (Appendix "A") fairly depicts the case for the prosecution and, consequently, the comprehensive presentation which we included in the Appellant's Opening Brief on Appeal (pp. 3 - 28) is unnecessary here and would, pagewise, effectively prohibit us from advancing our contentions, *which do not contest the sufficiency of the evidence to support the verdict.* The evidence, as noted by the Court of Appeal, was indeed quite conflicting. As that court stated, "This case presents a classic example of the 'Rashomon Gate!'

phenomena; several people viewed the same events yet perceived different things. We view the evidence in the light most favorable to the judgment. (*People v. Green* (1980) 27 Cal. 3d 1, 13.)" (Appendix "A", p. 2, n. 1.) Therein lies the fatal flaw in the court's analysis, pointed out in our Opening Brief on Appeal, again during the oral argument before the Court of Appeal, again in our Petition for Rehearing, and yet again before the California Supreme Court. For, unlike the usual murder-manslaughter cases where counsel routinely argue the insufficiency of the evidence, thereby obligating the reviewing court to recount the evidence most favorable to support the verdict, *that point was not presented in the appellate courts in this case.* The thrust of our argument (see Argument I, *infra*) is that the court only permitted the jury to consider homicide instructions supported by the prosecution's view of the evidence and, thereby, effectively removed from the selected trier of fact the option of believing evidence favorable to the defendant which would have supported a verdict of manslaughter. In view of our position, we will recount in the context of Argument I that evidence which specifically addresses that deficiency.

REASONS FOR GRANTING THE WRIT

The Court is here presented with an important question of low visibility but prolific reoccurrence in our jurisprudence whereby defendants in murder prosecutions are denied a

manslaughter defense because the trial court declines to let the jury consider it. It results in far more obnoxious results than that condemned by this Court in *Mullaney v. Wilbur*, 421 U.S. 684 (1975). For there at least the defendant had the opportunity to persuade the jury that he was guilty of manslaughter and not murder, while here the defendant was denied the opportunity to even argue the point although the evidence amply supported such a finding. The record in this case is perfect for handling such an important issue, because the California appellate court squarely ruled that the question of whether the defendant was entitled to have his defense of manslaughter decided by the jury must be judged by viewing the evidence from a vantage point most favorable to the prosecution (Appendix "A",pp. 4 - 7), a doctrine clearly at war with this Court's pronouncements guaranteeing the defendant a right to present witnesses in his behalf (*Washington v. Texas*, 388 U.S. 14, 19 (1967); *Webb v. Texas*, 409 U.S. 95 (1972); *Pointer v. Texas*, 380 U.S. 400 (1965), as well as the doctrine announced in *Mullaney v. Wilbur, supra.* See also *Douglas v. Alabama*, 380 U.S. 415 (1965).

Additionally, in this case, the prosecutor deliberately injected the improper allegation of "gang membership" into the case, a fact which the California court held to be error but not prejudicial; furthermore, the jury received information highly prejudicial to the defendant–again conceded by the California appellate court–and yet opined that it was not prejudicial. A review of our petition shows that the prosecutor

ran roughshod over the accused's right to a Fair Trial, but thus far no court has done anything about it

ARGUMENT

I

The Case Should Be Reversed Because Jury Instructions Relating To The Defense Of Involuntary Manslaughter Were Not Given, Resulting In A Jury Ramrodded Into A Second Degree Murder Conviction Which Otherwise Would Have Been Improbable The Failure To Permit The Jury To Consider The Defense Of Involuntary Manslaughter And The State Of California's Position That Only Evidence Favorable To The State Should Be Considered In Deciding Whether To Allow The Jury To Consider A Verdict Of Involuntary Manslaughter Clearly Contravened Petitioner's Right To A Fair Trial Under The Fourteenth Amendment To The United States Constitution

This Court held in *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged, and in *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975), this Court made it abundantly clear that that proposition applied to the lesser homicide of voluntary manslaughter. In fact, when confronted with the Maine state court's thesis that the state need only prove the criminal homicide beyond a reasonable doubt–not the degree–this Court declared:

> "This is an intolerable result in a society where to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter." (95 S. Ct. at 1892.)

Although *Mullaney* involved the possibility that the crime committed was voluntary manslaughter committed during the heat of passion, this Court recognized that at common law and under contemporary American law the crime of involuntary manslaughter has deep roots in our fundamental jurisprudence (421 U.S. 693, n. 14).

It stands to reason then that if it is a violation of the Fourteenth Amendment to saddle the defendant with the burden of proving that a criminal homicide is manslaughter rather than murder, it is even a more evident violation if the defendant was prevented from having the jury even *consider* the crime of manslaughter.

Although the information in this case alleged that the defendant was guilty of murder, that charge encompassed the lesser included charges of voluntary manslaughter and involuntary manslaughter as long as there was evidence to support them.[1]

Lesser included charges, including second degree

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[1]California Penal Code § 1159; *People v. Sedeno*, 10 Cal. 3d 703, 112 C.R. 1 (1974); *People v. Dewberry*, 51 Cal.2d 548, 555-57 (1959); *People v. Doolittle*, 23 Cal. App. 3d 21, 99 C.R. 810 (1972); *People v. Carmen*, 36 Cal. 2d 768, 773, 228 P.2d 281, 284 (1951); *People v. Heffington*, 32 Cal. App. 3d 1, 107 Cal. Rptr. 859 (1973); *People v. Flannel*, 25 Cal. 3d 668, 160 C.R.84.

murder and the manslaughter charges, must be given *sua sponte* even if counsel does not request them. (*People v. McManis*, 26 Cal. App. 3d 608, 102 C.R. 889; *People v. Alfreds*, 251 Cal. App. 21, 666, 59 C.R. 647.) And the "obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense." (*People v. Sedeno, supra.*)

However, in this case as early as page four of the trial the defendant's counsel asked the Judge to inform the jury of its options concerning lesser offenses of second degree murder and manslaughter and the judge declined (Reporter's Transcript 4 [hereinafter R.T.]). And on every occasion he was in quest of the appropriate lesser included offense instructions (R.T. 773, 736; C.T. 103-04, 05).

The court purported to instruct the jury on the offenses of first and second degree murder and voluntary manslaughter and rejected the defendant's requests for instructions on involuntary manslaughter (*ibid*).

The court should have given CALJIC 8.51, which would have permitted the jury to convict the defendant of manslaughter upon a finding that he committed an act (here firing a gun in the direction of a possible pursuer) dangerous to human life and done in a criminally negligent fashion.

The trial was by jury so it was not for the court to determine which view of the evidence to adopt. The firing of a gun can be done lawfully but done in such a dangerous fashion as to amount to criminal negligence, that is, "a high degree or risk of death or great bodily harm, without due caution and circumspection." (CALJIC 8.45 (1980 Rev.)) The jury should have been able to choose between CALJIC 8.31 (1974 Rev.) and 8.45. How could the judge determine *as a matter of law* that the shooting occurred only under circumstances demonstrating a wanton disregard for human life and was done for a base, antisocial purpose as opposed to a high degree of criminal negligence.

There is insufficient space here to recap all of the evidence. Suffice it to say that traditionally, in seeking to uphold a judgment, the state gets the benefit of the most favorable view of the evidence. But that situation is totally reversed where, as here, the jury was given no opportunity to evaluate the nature and gravity and circumstances under which the defendant fired the weapon. It is incumbent upon the state to show that there was insufficient credible evidence which would permit the jury to reach a verdict of involuntary manslaughter. The testimony of the witnesses friendly to the deceased showed two very large men, one drunk or nearly so and the other having been drinking, who demonstrated violent acts against the defendant's friend, a man five feet tall, by choking him and then banging him against the brick wall of a building.

There was evidence that even though the defendant fired

a gun into the air, it failed to prevent a host of pursuer - some twice his size and intoxicated who had just bashed his friend's head up against the wall of a building and choked him—from chasing after him, such actions being classified even by the deceased's friends as "stupidity." (R.T. 180, 249.) Moreover, the defendant testified that officer Bontempo never identified himself as a police officer (R.T. 614), and other witnesses were vague on the subject, with a *prosecution witness* (the deceased's brother) relating that Bontempo yelled at the defendant, "Come on asshole, get the fuck out of here," which is what the defendant tried to do (R.T. 140), namely, to run away from trouble, and that when he fired the gun he ever intended to hit anyone and that he felt he was in "imminent danger" . . . because "I was afraid of once he got hold of me, he would kill me." During the entire time he was running, he "was always fearful of my life." (R.T. 466-73.)[2]

The facts are a hundred times more than sufficient to warrant the involuntary manslaughter instructions.

If that were not enough, the jury itself reported to the court that it was having difficulty distinguishing between second degree murder and voluntary manslaughter. To be more precise, the note from the jury defining their quandary read

[2]As pointed out *supra* and *infra*, the appellate court simply ignored the evidence favorable to the accused and wrongfully concluded that the *trial court only had to instruct the jury based upon the evidence most favorable to the prosecution.* Petitioner vehemently objects to this approach.

as follows:

> "We [the] jury in the above entitled action, request the following clarification: second degree murder and voluntary manslaughter. Specifically, there appears to be a conflict between Section 8.31, paragraph 2, and Section 3.31, paragraph 2, with regard to the intent to kill and an act that would result in death." (R.T. 860-61.)

That tells us not only that the jury could have thought *but did in fact think* that the defendant was *not* intending to kill the deceased, Ralph Chew, but committed a dangerous act which resulted in death. The court by declining to give them the involuntary manslaughter option and stressing the word "also" in Instruction 8.31, gave them what was tantamount to a directed verdict (R.T. 861-66).

Petitioner is in disagreement with the opinion of the Court of Appeal in a very vital respect; namely, the appropriate factual rendition with regard to the failure to give the jury the involuntary manslaughter option as opposed to the situation where the claim is made *that the evidence is insufficient to support the verdict.*

In the present case, criminal negligence amounting to involuntary manslaughter and not rising to the level of implied malice was vivid and the evidence so contradictory that what should have been supplied the jury were all of the instructions, allowing them to make the appropriate choice as to which degree of homicide the crime belonged. The facts related above easily make involuntary manslaughter an acceptable result unless we are to deny the evidence of the defendant and that of some of the prosecution witnesses. Counsel fails to see why the fact that the defendant fired a gun into the air

out of fear that his friend was going to be seriously harmed, which is supported amply by the evidence, denudes his genuine subsequent fear that a group of drinking persons, who had engaged in a violent argument reaching the commission of violent acts and who were chasing him, could have caused him to fire in their direction in a criminally negligent fashion [3]

This last observation underscores our central disagreement with the appellate court's opinion. The court, in setting forth the facts of the case, commences with the thesis: "*We view the evidence in the light most favorable to the judgment.*" (Appendix "A", p. 2.) That supposition is clearly correct and the facts are fairly stated from that vantage point *if the issue was the sufficiency of the evidence to support the conviction; but that was not the issue!* Unfortunately, for a variety of reasons on appeal, in these kind of cases, counsel routinely question the sufficiency of the evidence and the court responds as in this case, which is entirely appropriate for those situations. The reasons counsel proffer the insufficiency of the evidence argument are usually: (1) He thinks it is his job, or because his client expects it; (2) He cannot find any other argument to present and feels compelled to say something; or (3) A counsel with foresight may wish to preserve the factual record for some later day *habeas corpus*

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[3] In *People v. Alvarado*, 133 Cal. App. 3d 1003, cited by the appellate court (Appendix "A", p. 7), the court simply rebuffed defendant's attempt at voluntary manslaughter instructions in a case where he became enraged and brutally attacked and killed an elderly lady who merely woke up and screamed during his burglary of her apartment.

attack when the best and perhaps only available rendition of the facts is that recited in the Court of Appeal opinion.

Almost invariably in the murder-manslaughter cases it is contended that the evidence is insufficient, and the court is therefore duty-bound to recite the evidence from the view most favorable to the prosecution. However, where the issue is whether there is the necessary quantum of evidence to permit the jury, selected to try the issues of fact, to choose from amongst closely related crimes which may depend on state of mind, conflicting evidence regarding the situation, make judgment calls on whether certain beliefs were reasonab le or unreasonable, honest or dishonest, objective or subjective, or whether certain conduct fits within the rubric of criminal negligence as opposed to implied malice, the burden on the defense is simply to show that there is evidence to permit the *jury* to decide.

The court in this case, in reciting the case *from the prosecution's vantage point,* failed to permit the jury to consider the evidence favorable to the defendant's case. In the court's rendition of the facts it refers to the decedent as a person who drank some alcohol, but was not actually drunk (Appendix "A", p. 2). Actually, *from prosecution witnesses,* we know that according to officer Bontempo he was planning to drive him home because he was too intoxicated to operate his vehicle safely (R.T. 317-18); and the autopsy showed that his blood alcohol was .14, well above the limit for negotiating an automobile (R.T. 414). Also

the defendant did not know Bontempo was a police officer (R.T. 614, 1401. *Cf.* Appendix "A", p. 9: "Bontempo ... had identified himself as a police officer".) The other factors such as the altercation, the violence against the defendant's tiny friend by much, much bigger men and the defendant's contention that he was trying to escape and fired behind him only when he felt in imminent danger of serious personal harm and did not intend to hit anyone, easily support the giving of involuntary manslaughter instructions.

Although it is not necessary to the decision, because inconsistent defenses can be presented at trial, in a case like the present one *the defenses of self-defense and the various kinds of manslaughter are not even inconsistent defenses.* It is merely a case of the defendant adducing evidence, some his own and the rest from other sources or other witnesses, explaining the circumstances under which the killing occurred.

In other words, it is the jury's function to put the right label on the totality of the circumstances, not the prosecution's and not the defense's. The *question* as to whether under all of the circumstances the action of firing in the direction of persons whom the defendant had every reason to believe would do him serious bodily harm if he was caught (who else would chase a man with a loaded gun, deemed an act of "stupidity" by prosecution witnesses and friends of the deceased) was manslaughter by criminal negligence was for the *jury*; and, similarly, whether the defendant's belief that he was about to suffer serious bodly harm was reasonable or unreasonable under all of the circumstances was a question for the *jury*, not a judg-

ment *he* could even make or a defense to which *he* could even limit himself (see, e.g., *People v. Sedeno, supra*).

This case was susceptible of the conclusion that the defendant brandished his weapon in a dangerous and criminally negligent fashion (see California Penal Code § 417) without harboring a wanton disregard for human life or displaying an abandoned and malignant heart.

This Court has repeatedly held that an accused has the right to confront and cross-examine his accusers (*Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965)) and to present evidence in his behalf (*Washington v. Texas*, 388 U.S. 14, 19 (1967); *Webb v. Texas*, 409 U.S. 95 (1972)), but these constitutional guarantees remain patently empty if the jury cannot consider the testimony. The State of California in holding that the jury could only consider the defense of involuntary manslaughter *if the prosecution's evidence provided substantial support* effectively foreclosed the petitioner's right to a Fair Trial and was a much more flagrant denial of due process than the situation in *Mullaney v. Wilbur, supra*, because, in *Mullaney*, the defendant at least had the chance to convince the jury that the evidence warranted a manslaughter verdict while, here, he had none at all since the court held that the jury was only entitled to return a verdict of involuntary manslaughter if the evidence stated from the vantage point most favorable to the prosecution supported such a result. This case should be remanded for a new trial or a disposition consonant with the true gravity of the offense.

II

The Entire Record Demonstrates That The Prosecuting Attorney Failed In His Duties As The Representative Of The Sovereignty, Whose Words Are Believed By The Average Jury, And Was Guilty Of Purposeful And Flagrantly Prejudicial Misconduct, Thereby Depriving Petitioner Of His Right To A Fair Trial Guaranteed To Him Under The Sixth And Fourteenth Amendments To The United States Constitution. Moreover, All Hope of A Fair Trial Vanished When Damaging Inadmissible Evidence Visited The Jury Room In The Form Of Information Concerning "Gamg Membership"— Which The California Courts Have Held Especially Highly Prejudicial In The Los Angeles Area.

A. Statement of evidence of prejudicial misconduct of the prosecutor and the improper receipt of evidence impairing defendant's right to a fair trial.

On April 13, 1981, the jury selection process commenced. It was completed with the jurors and alternates being sworn and the case beginning on April 15, 1981. Eight days later, on April 23, 1981, problems arose concerning some of the regular and alternate jurors. Of importance here was a note received from one of the regular jurors, a Mr. Tomlinson. He asked to be excused for two reasons. The first had to do with personal problems. The second was:

> "Number 2, I read in the paper about a year ago about dumb Chinese youths, mostly illegal aliens, in gangs who harass the merchants of Chinatown making them pay for protection. The merchants are afraid to respond—or to report these due to retaliation." (R.T. 89-90.)

The court ordered Mr. Tomlinson produced in court and questioned concerning the belated correspondence. The

court stated that it was "quite concerned" about the failure of the juror to bring the matter of the newspaper article to the attention of the court and counsel during the voir dire proceedings, and the juror responded, "Well, it didn't come to me 'til later." He stated that occurred after the jury had been selected and during the week during which they were not in session. He further stated that he had not discussed that information with the other jurors. He was then dismissed from jury service by stipulation of the parties and replaced by an alternate juror (R.T. 100-03).

Later on the same day as Juror Tomlinson's revelation, the witness Derek Chew, brother of the deceased, in testimony before the jury concerning seeing the defendant and his two Oriental friends exit the Lee Terrace Bar, referred to the group as "The Gang" (R.T. 134).

After the prosecution had closed its case-in-chief and the defendant had completed his direct examination, the prosecutor, within seconds of beginning his cross-examination, stirred up a hornet's nest:

> "Q. Mr. Tong, are you a member of Wah Ching Gang?
>
> "MR. WEIT (defense counsel): Your Honor, I will object. This is irrelevant.
>
> "THE COURT: Approach the bench, counsel . . ." (R.T. 474.)

Clearly, the prosecutor was aware of the fact that neither in his opening statement nor in his evidence had he suggested that the defendant was either a member of the Wah Ching Gang or that such a fact, if proved, was relevant. Also he was

familiar with the law on the subject which forbade him to ask such a question unless the evidence showed that was the motive for the criminal activities or for a witness fabricating evidence to corroborate his friends or associates, for he would cite it one page later (R.T. 475). (See *People v. Szeto*, 29 Cal. 3d 20, 171 C.R. 652 (1981), and *In re Wing Y*, 67 Cal. App. 3d 69, 136 C.R. 390 (1977).)

This point could not be fully brought to the attention of the Court without a statement of the record with reference to further misconduct of the prosecution and the improper receipt of evidence. Since this is quite voluminous, we will, for the convenience of the Court, set same forth as Appendix "D" hereto. This appendix will show the insinuations made by the prosecuting attorney as to the defendant's membership in Wah Ching (these insinuations were made despite the trial court's admonition against such references); the prosecutor's injection of racism into the case by stating that the defendant did not like the deceased because the deceased was married to a Caucasian (when the defendant, in fact, had no knowledge that the deceased was even married); and what happend in regard to the defendant's friend Mr. Kwan (in the presence of an alternate juror who later became a regular juror). We invite the Court's attention to this recital (Appendix "D", pp. 13 - 26).

B. The legal decisions governing the situation call for a reversal due to prejudicial misconduct by the prosecutor and the improper receipt of evidence resulting in a jury verdict based upon materials this Court has held could not serve as the basis of a conviction. The California appellate court

acknowledged both of these errors but then applied the wrong analysis of the effect of the errors to affirm the judgment.

The prosecuting attorney in this case failed to heed the command of this Court clearly set forth in *Berger v. United States*, 225 U.S. 78, 88 (1935), that the prime duty of the United States Attorney in criminal prosecutions is not to convict but to see that "justice is done." The right of a criminal defendant to a fair prosecutor, insured by this Court in *Berger*, is a part of the very fabric of American justice. The inspiring words written by Mr. Justice Sutherland must be so often quoted to the courts of the land that to do so in this Court would seem unnecessary and a reference to *Berger* should suffice.

The special role of the prosecutor is stressed in unequivocal language in the *Code of Professional Responsibility* of the American Bar Association in Ethical Consideration 7-13 under Canon 7. It says, "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."

In reversing a conviction because a prosecuting attorney failed to meet these high standards, the court in *Hall v. United States* (5th Cir. 1969), 419 F.2d 582, 583-84, said that he had "great potential for jury persuasion," that "his role as a spokesman for the government tends to give to what he says the ring of authenticity. The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says" and that in his voice and person "is the unseen presence in the courtroom of our great and powerful government."

As pointed out in *Handford v. United States*, 249 F.2d 295, 296 (1947), "he [the prosecuting attorney] is the representative of a government *dedicated to fairness and equal justice to all.*" Such representation imposes an overriding fairness so important that "*Anglo-American criminal law rests on the foundation; better the guilty escape than the innocent suffer.*" (Emphasis ours.)

In the instant case, rather than meeting the high responsibility imposed upon him, the prosecutor created "an atmosphere of prejudice imperiling dispassionate judgment" (*United States v. Bukowski* (7th Cir. 1970), 435 F.2d 1094). His misconduct was "of a flagrant nature resulting in a pattern of prejudicial impropriety" (*United States v. Achilli* (7th Cir. 1968), 234 F.2d 409, 414). Such was the case here.

C. In recapitulation:

(1) Juror Tomlinson being replaced because of information he had read reciting that gangs of dumb Chinese youths were preying upon the merchants of Chinatown and the merchants would not report these occurrences because they were fearful of retaliation (pp. 17, 18, *supra*).

There is sage law which holds that a trier of fact must base his conclusions as to a defendant's guilt only on evidence adduced in open court and not on any outside influence[4].

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[4]*Patterson v. United States*, 205 U.S. 454 (1907); *Shepard v. Maxwell*, 384 U.S. 333, 350-51, 362-63, 86 S.Ct. 1507 (1966); *Irwin v. Dowd*, 366 U.S. 717, 722, 728, 81 S.Ct. 1639 (1961); *Rideau v. State of Louisiana*, 373 U.S. 723, 727, 83 S.Ct. 1417 (1963); *Parker v. Gladden*, 385 U.S. 363, 365, 87 S.Ct. 468 (1967); *Turner v. Louisiana*, 379 U.S. 466, 85 S. Ct. 546 (1965); *Mares v. United States*, 383 F.2d 805, 809 (10th Cir. 1967), *cert. denied*, 394 U.S. 963 (1970).

It is true that the juror, when questioned, denied that he had imparted the information to fellow jurors, but frankly, it is apparent that the reason he placed number one to be relieved was harassment from his wife at home, and his claim that he just happened to remember a newspaper article he had read a year before during the period when his wife made a strong pitch to him to leave the jury seems highly improbable. Also, in the absence of questioning the other jurors, it is not even probable that he neglected to share with fellow jurors those biases he probably secreted during voir dire.

(2) The terminology employed by the brother of the deceased, who was also a seasoned fireman for the L. A. Fire Department, that the defendant and his Chinese friends constituted a "gang" should, at the very least, cause a person concerned about essential justice to wince (p. 18, *supra*). (R.T. 134.)

(3) The saga of the body attachment of the defendant's friend, Edward Kwan (Appendix "D", pp. 23 - 26).

Initially, it must be pointed out that Juror Stich, who was an alternate at the time she heard the Kwan contempt hearing, was a juror in the deliberative sense from start to finish. And, since she was in a position to share her knowledge obtained while her future jury partners were sequestered, we cannot assume that she did not do so, and her vote was necessary for a guilty verdict in any event. (*People v Brown*, 61 Cal. App. 3d 476, 132 C.R. 217 (1976).)

From just what she observed in the courtroom, it is abundantly clear that Juror Stich knew that the prosecution had sought to obtain Edward Kwan as a witness and that he did not want to testify. Also, she knew that he was a friend

of the defendant, seen eating with him at the Tai Hong Restaurant by the police officer whom he told he would show up in court, and that the defendant therefore did not want his testimony. Moreover, without any evidence on the subject, proof was offered that he could communicate in English because the officer confronting him only spoke English.

The Court of Appeal assumed these events occurred and yet, nevertheless, concluded that, "[W]e see nothing in the testimony at the hearing which would affect Juror Stich's evaluation of the case. We therefore find no prejudice to Tong." (Appendix "A", p. 10.)

(4) The prosecutor's comments during his summation wherein he claimed private knowledge concerning "Mr. Tong and his three friends" (the connotation of a gang up to no good becomes the probable assessment despite the law rendering such a consideration illegal) (Appendix "D", p. 21).

And, of course, the insinuation during that self-same argument that the defendant obviously did not want to produce those persons who could corroborate his story, especially one who had been brutalized, left an ineradicable image of a gang of persons hellbent on mischief.

(5) The prosecutor's injection of racism without any basis whatsoever (Appendix "D", p. 22).

All of the above considerations furnish more than is necessary to display just how pernicious and unjust the insertion of the "Wah Ching Gang" motif was in the case. And if you add to these facts the suggestions—vigorously objected to by defense counsel, as he was dutybound to do given the predicament the prosecutor had placed him in—that these persons

were all members of the same "gang" unfairness unquestionably crept into the jury room.

The prosecutor full well knew, as his investigator candidly stated, that he had no proof of any of these matters. But we already know how cavalierly he represented to the court facts which he knew to be false or had no evidence to support, such as that an L. A. Police Officer had lawfully handed to the witness Kwan a subpoena, and the witness failed to appear, when, in fact, the subpoena was for a date prior to its service on the witness's father. At any rate, the law is clear that the prosecutor may not ask questions of witnesses, especially defendants, suggesting the existence of facts which the prosecutor knows to either be untrue or not provable or inadmissible, and by so doing he is guilty of rank misconduct (*Michelson v. United States*, 335 U.S. 469, 69 S. Ct. 213, 221 (1948)–and numerous California cases to the same effect).

It is especially disturbing when we realize that after a comprehensive hearing the trial judge specifically instructed the prosecutor not to ask "Wah Ching" questions without first approaching the bench, because of the potential for reversible error and the limited grounds for making such inquiries, the court explicitly telling the prosecutor that he could not ask the defendant about his associates' gang membership unless they testified, so that their motivation to fabricate became an issue. Defense counsel timely moved for a mistrial, and it should have been granted. It is certain that the prosecutor failed to live up to the high standards imposed upon him.

Interwoven in this case is a fabric which not only demon-

strates prosecutorial misconduct and the illegal receipt of inadmissible evidence by a trial juror, but focuses upon the difficulty the jury obviously had with the case trying to ascertain whether it was a crime of second degree murder or manslaughter (R.T. 860-66). Had the above errors not occurred, it is highly probable the verdict would have been manslaughter.

Regarding the prosecutor's questioning of the defendant about his membership in the Wah Ching Gang, the Court of Appeal held that "[e]ven if the question had constituted misconduct, Tong was not harmed by it. An objection was made before the defendant answered, and the jury was immediately admonished that questions are not to be considered evidence" (Appendix "A", p. 8). As opposed to the first inquiry about "Wah Ching" wherein the jury was instructed to disregard the question, there was no such admonition given to subsequent references. We vigorously contend that it is a "feat beyond the compass of ordinary minds" to expect the jury both to remain unaffected by an accusation of gang membership and to simultaneously recall general admonitions to the effect that questions are not evidence. In fact the failure to instruct that a question was not evidence, in contrast to earlier admonitions, might well have led the jury to conclude that the question had some substance behind it.

The ultimate thrust of the Court of Appeal's opinion is that no prejudice was shown the defendant, despite the prosecutor having ridden roughshod over his rights, because a homicide had been committed according to the evidence

viewed from the prosecution's vantage point.[5] We respectfully disagree for three reasons. The California Supreme Court has held "that jury deliberations of almost six hours are an indication that the issue of guilt is not open and shut and strongly suggests that errors in the admission of evidence are prejudicial." (See *People v. Cardenas*, 31 Cal. 3d 897, 907 (1982).) Secondly, the real issue in this case was whether the accused was guilty of murder or manslaughter, and the jury's request for additional instructions clarifying the difference between them was of great importance (pp. 11, 12, *supra*). The final reason why we think the errors complained of were of significance is illustrated in *People v Cardenas, supra*, the most recent California Supreme Court case on gang membership, wherein a plurality found that evidence of gang affiliation poisoned the case against the defendant. The court noted therein: "In Southern California, Chicano Youth gangs have received widespread media publicity for their purported criminal activities" (at p. 905). The same can be said of Chinese street gangs, and the admissions of Juror Tomlinson, albeit tardy, attest hardily to this fact (R.T. 89-90). Tomlinson's impressions of the activities of the gangs were the same

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[5]The Court of Appeal's analysis on this point (Appendix "A" p. 9) is decisively shallow. The court simply reviews the evidence from the prosecution's vantage point and concludes that the evidence readily supports a conviction. What is omitted is what type of homicide could the jury have determined to have been committed given the fact that it was entitled to believe pro-defense evidence, too, if they had been given appropriate involuntary manslaughter instructions?

impressions the prosecutor sought, admittedly without e' ' dentiary foundation, to introduce into evidence at the trial.

In summary, in a case where the evidence was so conflicting that it has proved impossible to write a single consistent version of the events, and where the decision on murder or manslaughter could well have turned on the jury's evaluation of whether the accused was a small frightened individual being pursued by a horde of persons—some very, very large and intoxicated who had already committed violent acts against his diminutive friend and were out to do him harm—or a person whose basic character traits were antipathetic to the police and who was poised to actualize his malice, the damage done warrants a new trial.

Our quest is not to absolve the defendant of blame, but to allow the trier of fact to determine the magnitude of his crime.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LUKE McKISSACK

Attorney for Petitioner

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APPENDIX "A"

OPINION OF THE COURT BELOW

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

2d Crim. No. 41002 (Super. Ct. No. A361484).

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. WOO CHIN TONG, Defendant and Appellant.

FILED FEBRUARY 28, 1983

Not To Be Published

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert L. Roberson, Jr., Judge. Affirmed.

Luke McKissack for Defendant and Appellant.

George Deukmijian and John K. Van de Kamp, Attorneys General, Robert H. Philibosian and Daniel J. Kremer, Chief Assistant Attorneys General, S. Clark Moore, Assistant Attorney General, Shunji Asari and Cynthia S. Waldman, Depty Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Woo Chin Tong (Tong)

appeals from a judgment of conviction of second degree murder following a jury verdict. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

On June 28, 1980, the victim, Ralph Chew (Ralph) was master of ceremonies at a wedding reception and banquet at General Lee's Restaurant honoring his brother Derek. During the course of the celebration, Ralph drank some alcohol but was not actually drunk. When General Lee's Restaurant closed, about 10 people decided to continue the celebration at the nearby Lee Terrace Bar. Among them were Ralph, Derek and their close friend, Los Angeles Police Officer Don Bontempo (Bontempo). Most of the group sat at a cluster of tables near the center of the bar; Ralph and Bontempo sat in a small booth just behind them. The group was a little boisterous and loud.

Ralph went up to the bar and asked for water or 7-Up; however, the bartender refused to serve him. He returned to the booth and was chatting with Bontempo. Tong came in a little later, spoke with employees of the bar, and then

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[1]This case presents a classic example of the "Rashomon Gate" phenomena; several people viewed the same events yet perceived different things. We view the evidence in the light most favorable to the judgment. (*People v. Green* (1980) 27 Cal. 3d 1, 13.)

approached Ralph and Bontempo and told them to quiet down or they would be thrown out.

A short while later Tong and several friends walked out of the bar. Ralph and Bontempo also left and were confronted by Tong and three other males. Outside, Ralph and Tong got into a heated argument. Bontempo identified himself as a police officer. A scuffle broke out between Bontempo and one of Tong's friends.

One individual grabbed Bontempo's right arm and Bontempo took him by the throat and banged his head against the wall. Tong shouted for Bontempo to leave the person alone. Bontempo released the person and turned to Tong, whereupon Tong pulled a small chrome revolver from the small of his back, pointed it at Bontempo, and then fired it at approximately a 45 degree angle in the air.

Tong and two of his friends fled and Ralph, followed by Derek, began immediate pursuit. Bontempo also gave chase. While being chased by Ralph who was 20 feet behind him, Tong turned, and with his right arm extended, fired the gun. The bullet struck Ralph in the chest and he died of a resultant hemorrhage.

At trial, Tong testified that he ran because he was afraid that "once he got hold of me, he would kill me." He claimed to have no intention of shooting anyone, rather his amorphous motive was to stop his pursuers.

A motion for a new trial was made and denied. Tong was duly sentenced, and this timely appeal followed.

ISSUES

Tong raised two main issues on appeal: whether it was error to refuse to instruct the jury on involuntary manslaughter; and whether there was prosecutorial misconduct warranting retrial.

DISCUSSION

1. Refusal to instruct on involuntary manslaughter.

The jury was instructed on first and second degree murder, voluntary manslaughter and self-defense. Tong's request for involuntary manslaughter instructions was denied.

Tong contends that the trial court erred in refusing to give CALJIC Nos. 8.37[2], 8.45[3] and 8.51[4] which define

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[2]CALJIC No. 8.37 (4th Ed. 1979) reads as follows: "The crime of manslaughter is the unlawful killing of a human being without malice aforethought. It is not divided into degrees but is of two kinds, namely, voluntary manslaughter and involuntary manslaughter.

[3]CALJIC No. 8.45 (4th Ed. 1980) reads as follows: "[Defendant is charged in [Count ..... of] the information, with the commission of the crime of involuntary manslaughter, a violation of Section 192 of the Penal Code.] [Para.] Involuntary manslaughter is the unlawful killing of a human being without malice aforethought and without an intent to kill. [Para.] In order to prove the commission of the crime of involuntary manslaughter, each of the following elements must be proved: [Para.] 1. That a human being was killed, and [para.] 2. That the killing was unlawful.
(Balance of n. 3 and n. 4 - see next page.)

involuntary manslaughter. He claims that the jury should have been able to decide whether the firing of the gun constituted implied malice or simply constituted criminal negligence.

Involuntary manslaughter is the killing of another human being in the commission of a misdemeanor, or in the commission of a lawful act performed without due caution and circumspection.[5] (Pen. Code, § 192.) In contrast to murder which requires malice, i.e., "an act involving a high degree of probability that it will result in death, which act is done . . . with a wanton disregard for human life." (CALJIC 8.11 (4th Ed. 1979 Rev.), manslaughter requires only an act of criminal negligence.

Although guns are inherently dangerous instruments,

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[3](continued) [Para.] A killing is unlawful within the meaning of this instruction if it occurred: [Para.] 2. During the commission of a misdemeanor which is inherently dangerous to human life, namely, the offense[s[of .....; of [para.] 2. In the commission of an act ordinarily lawful which involves a high degree of risk of death or great bodily harm, without due caution and circumspection. [Para.] [There is no malice aforethought if the killing occurred in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury.]"

[4]CALJIC No. 8.51 (4th Ed. 1979) reads in pertinent part: "[There are many acts which are lawful but nevertheless endanger human life. If a person causes another's death by doing such a dangerous act in an unlawful or criminally negligent manner, without realizing the risk involved, he is guilty of manslaughter. If, on the contrary he had realized

(Balance of n. 4 and n. 5 - see next page.)

some killings by gunshot have been deemed only criminal, negligent. (See *People v. Clark* (1982) 130 Cal. App. 3d 371, 382.) An involuntary manslaughter verdict is even possible where the defendant deliberately pulls the trigger. (*People v. McGee* (1947) 31 Cal. 2d 229, 238; *People v. Carmen* (1957) 36 Cal. 2d 768, 776.) Therefore, where the victim died of a gunshot wound, a trial court may be obligated to instruct on involuntary manslaughter.

A trial court is not required, however, to instruct in every case on all lesser included offenses of the charged crime. Rather the duty to instruct arises only where there is evidence that the offenses committed were less than charged. (*People v. Ramos* (1982) 30 Cal. 3d 553; 582; *People v. Sedeno* (1974) 10 Cal. 3d 702, 715.) Although older cases held that "any evidence deserving of any consideration" was sufficient to create a duty to instruct, (see e.g., *People v. Carmen, supra,* at p. 773; *People v. Sedano,*

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[4](continued) the risk and acted in total disregard of the danger to life involved, malice would be implied and he could be guilty of murder.]"

[5]Penal Code section 192 reads in relevant part: "Manslaughter is the unlawful killing of a human being, without malice. It is of three kinds: [Para.] . . . [Para.] 2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; provided that this subdivision shall not apply to acts committed in the driving of a vehicle.

supra, at p. 716) more recent cases require that the evidence be substantial before the duty arises. (*People v. Flannel* (1979) 25 Cal. 3d 668, 685; *People v. Alvarado* (1982) 133 Cal. App. 3d 1003, 1021.)

The only evidence which might support a finding of criminal negligence was testimony by Tong that he fired the shot out of fear, for the purpose of somehow stopping his pursuers. This evidence is not substantial enough to support a duty to instruct on involuntary manslaughter. (*Cf. People v. Jackson* (1980) 28 Cal. 3d 264, 306.) While attempting to elude Ralph, the police officer and others, Tong admittedly turned and pointed the gun in the direction of the victim who was only 20 feet behind him and fired. The bullet found its mark, causing Ralph's death.

The trial court therefore did not err in refusing the requested instructions.[6]

2. Prosecutorial Misconduct.

Tong asserts several different instances of prosecutorial

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[6]Tong also claims that the trial court erred in giving the 1975 version of CALJIC No. 8.50 instead of the 1980 version which includes imperfect self-defense in the definition of manslaughter and expressly allocates the burden of proof. The trial court did give CALJIC No. 8.40 (4th Ed. 1979 re-rev.) which instructs that voluntary manslaughter may be found where the defendant has an honest but unreasonable belief in the need for self-defense. CALJIC No. 8.72 which effectively places the burden of proof on the prosecutor also was given. Reading the jury charge as a whole, as we must, we *(Balance of n. 6 - see next page.)*

misconduct, the net result of which he contends was deprivation of a fair trial.

The first allegedly improper act was the prosecutor's questioning the defendant about his membership in the Wah Ching Gang. An objection to the question was sustained on the grounds that the evidence sought was more prejudicial than probative. While "[t]he deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct," it was not clear that counsel's question was improper. (*People v. Fusaro* (1971) 18 Cal. App. 3d 877, 886.)

The exclusion of evidence under Evidence Code section 352 is discretionary. The trial court held an extensive hearing before ruling conclusively. Given that the inadmissibility of the evidence was unclear, we find no misconduct in the prosecutor asking the question.

Even if the question had constituted misconduct, Tong was not harmed by it. An objection was made before the defendant answered, and the jury was immediately admonished that questions are not to be considered evidence.

Tong also protests that the prosecutor later asked Tong whether his friend Edward Kwan was a member of Wah Ching. The prosecutor had been told during the Evidence Code sec-

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[6](continued) we find no error in giving the 1975 version of CALJIC No. 8.50. (See *People v. Patterson* (1979) 88 Cal. App. 3d 742, 753; *People v. Rhodes* (1971) 21 Cal. App. 3d 10, 20.)

tion 402 hearing that he could not question Tong about the gang affiliations of his friends. The question therefore did constitute misconduct.

Prosecutorial misconduct mandates reversal only where it appears that it is reasonably probable that a verdict more favorable to the defendant would have been given in the absence of the misconduct. (*People v. Strickland* (1974) 11 Cal. 3d 946, 955.) Here the improper question was quickly objected to and the jury was instructed throughout the trial that questions are not evidence. Additionally the legitimate evidence against Tong was very strong. Tong was involved in an altercation with Ralph and Bontempo who had identified himself as a police officer. Tong pulled a gun and fired it and then ran. As he was being pursued, he admitted firing the bullet which struck and killed Ralph. Under these circumstances we find the misconduct to be nonprejudicial.

Tong also contends that the prosecutor made various improper comments during closing arguments. However, since no objecton was raised at that time, and since this was not a particularly close case, we shall not review such conduct on appeal. (See *People v. Perez* (1962) 58 Cal. 2d 229, 249; *People v. Ayers* (1975) 51 Cal. App. 3d 370, 380.)

The final ground for appeal is that one of the jurors was privy to information not introduced into evidence. Tong contends that Juror Stich, while still an alternate, witnessed a contempt hearing involving a friend of Tong's whom the prosecution had subpoenaed. The record is unclear as to whether Juror Stich was actually present. Assuming arguendo

that she was, we still find no reason to reverse. Juror misconduct requires reversal only where the defendant is prejudiced. (See *People v. Brown* (1976) 61 Cal. App. 3d 476, 481.) We see nothing in the testimony at the hearing which would affect Juror Stich's evaluation of the case. We therefore find no prejudice to Tong.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

KLEIN, P.J.

We concur:

LUI, J.

DANIELSON, J.

APPENDIX "B"

DENIAL OF PETITION FOR REHEARING

In the Court of Appeal of the State of California,
Second Appellate District, Division Three.

(Post Card Notice)

MARCH 30, 1983

Los Angeles, California
PEOPLE vs. TONG
No. 41002

PETITION FOR REHEARING DENIED

Clay Robbins, Clerk

APPENDIX "C"

DENIAL OF PETITION FOR HEARING
(Post Card Notice)

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

MAY 19, 1983

I have this day filed ORDER

HEARING DENIED

In re: 2 CRIM. No. 41002

People vs. Woo Chin Tong

Respectfully,

Clerk

STATEMENT OF THE RECORD

Misconduct of the Prosecution

And

Improper Receipt of Evidence

Commencing at Reporter's Transcript p. 474

At the bench the following colloquy occurred:

"THE COURT: What's the purpose for asking that question, counsel?

"MR. FOX: Motive.

"THE COURT: Just a moment, please. Are you suggesting that gang members give a motive to commit a crime such as - -

MR. FOX: Motive for this particular crime, it does. It's the People's theory - - and we intend to prove it by witnesses - - that he is a member of Wah Ching, among the other three that were present; that they are being paid extortion money by the Lee Terrace Bar for protection. They were called that evening to come there because the owner did not want the police there. The purpose of them coming there was to remove the people that were being referred to as the 'Big Party.' On this particular evening, he was carrying the gun for that very reason, in order to secure the bar of those individuals." (R.T. 474-75.)

The court stated that a hearing would have to be held on the claims prior to bringing back the jury. Defense counsel complained that the prosecution had put on their case and rested and had laid no foundation for this type of evidence. The court advised him to keep his voice down because the jury could hear what he was saying. The judge then observed:

"THE COURT: Let me ask you this and then I will let you respond if you feel it is necessary to do so; no-

> where in your opening statement did you have any thing about the motive in this case being that it was protection, that is, that the defendant was a member of a gang that purportedly provides protection for merchants in the Chinatown area and that the People's theory of the case is that the defendant killed or went there, rather, to honor his contract of protection, so to speak. I think that's extremely material when it comes to the question of defense. They should certainly know." (R.T. 476-77.)

The prosecutor's response only suggested that he could provide evidence that the defendant was a member of the Wah Ching and did not address the issue of the connection between that fact, if proved, and the motive for the crime as outlined by the prosecutor in his reason for introducing the evidence. The judge then asked:

> "THE COURT: Is there anything in the discovery material other than the fact that the defendant purportedly is a member of a gang that would lead an attorney defending a person - - lead him to believe that part of the People's case would be an effort to prove motive, the motive being that of enforcing a protection contract?
>
> "MR. FOX: Well, is there anything that - -
>
> "THE COURT: I'm asking you; don't ask me a question.
>
> "MR. FOX: I don't quite understand the Court's question.
>
> "THE COURT: As I understand, Mr. Fox, what you're saying is that there is information in the discovery material that shows or at least suggests the defendant is a member of a particular gang.
>
> "MR. FOX: Correct.
>
> "THE COURT: Other than that membership, is there anything in that discovery material that would lead a defense counsel to believe or to be aware of the fact that the People were intending to show that the defendant's motive for committing a particular crime was to enforce a protection contract?" (R.T. 477-78.)

After a brief exchange the court ordered a hearing on the subject and, for the moment, sustained defense counsel's objection to the question and instructed the jury to disregard it (R.T. 479-80).

At the 402 hearing the court led off with a correct legal observation:

> "All right. I did read People versus Szeto. The issue that you're talking about is gang identification, membership in a gang. As I read that case, the motive became important because the defendant in that case purportedly disposed of guns, and his membership in a gang was offered to show a motive; that is, his reason, the motive for him to take possession of those guns and dispose of them and secrete them." (R.T. 483.)

The prosecutor's response was, "Those are the facts of this case, Your Honor." He also mentioned that it was permissible to use gang membership to impeach witnesses where it was appropriate. When the trial court asked the prosecutor to restate his position he stated that "the affiliation of this defendant with Wah Ching is to explain his possession of a firearm that particular evening" and that the Lee Terrace bartender made a phone call prior to the arrival of the defendant and "that phone call was made with the specific purpose in mind to obtain the assistance of this gentleman along with several other friends." Defense counsel pointed out that the bartendress in question was available in the hall. The prosecutor then suggested that he was in a position to prove that "this defendant was provided or possessed the firearm in order to check on several establishments; in particular, Lee Terrace Bar, which was a bar that

was part of the so-called protection gang that was being conducted at that time by Wah Ching." The prosecutor also suggested that the defense might produce witnesses who were active members in Wah Ching and would have a motive to fabricate their testimony. The trial judge then synthesized the issues:

> "THE COURT: Well, that, of course, would fall within Wing Y. If you had a claim of motive to fabricate, I follow you then. In other words, say a witness took the stand and testified as a witness for the defense and you attempted to show motive to fabricate on the basis of a comraderie, so to speak, because of their gang membership. That falls within the Wing Y case.
>
> "Let me see, Mr. Fox, if I can capsulize the issue of motive more in a nutshell, at least as to what you are trying to tell me.
>
> "Are you indicating, in effect, that as the case now stands, your purpose for showing the defendant's motive for being there, i.e., that he was there as part of his job or duty as a member of Wah Ching and furnishing protection to that bar; and that that reason for being there impeaches his testimony as to why he was there. Is that it in a nutshell?
>
> "MR. FOX: That's one aspect. A second, also is to impeach his testimony regarding why he was in possession of a firearm that night." (R.T. 483-89.)

Testimony was then taken. Investigator Vogl testified to compiling a "murder notebook" on the case and that it has references to the defendant and the persons with him being possibly Wah Ching members (R.T. 490-98). The court then opined:

> "I'm concerned with this: assume that the book, the murder book, is full of references to Wah Ching membership; how does that put anyone on notice that being a member of Wah Ching is synonymous with being part of a gang who furnishes protection

to business establishments? That's my concern." (R.T. 501.)

The prosecution conceded that was their theory, but that there might not be evidence to support it (R.T. 501-02). Investigator Vogl, when questioned by defense counsel, conceded that he had no information that the ownership of the Lee Terrace Bar placed a phone call to the defendant or that the defendant or the Wah Ching Gang had been paid to protect the establishment (R.T. 507-09).

The next witness, Frank Yen, testified that he was a police officer for the City of Los Angeles and had worked the Chinatown area "a little over two, three months." He testified that he had seen the defendant in the company of persons he felt were members of the Wah Ching Gang. (R.T. 516-28.)

The final witness during this hearing was Randall Quan, another police officer assigned to the Asian Task Force. He, in essence, testified that he was familiar with various members of the Wah Ching Gang and that in his opinion the defendant was a member (R.T. 528-51). He defined the criminal objectives of the Wah Ching as wanting "to get money without working for it or getting services, such as going to restaurants to eat, without paying." (R.T. 541.)

The court then accepted a stipulation to the effect that if Edward Kwan were called he might testify that he was a member of the Wah Ching Gang and that the defendant and the two other persons who were with them on the night of the shooting were also (R.T. 552-53).

Argument was then heard. The prosecutor's argument

at best amounted to maintaining that if the defendant was a member of the Wah Ching Gang that would prove why he had a gun and did what he did at the Lee Terrace without any enunciation as to why those conclusions would follow (R.T. 554-58). The defense pointed out that the prosecution's argument was mere theory without even the claim of evidentiary support and that the prosecution's arguments did not lead to the prosecution's conclusions (R.T. 558-60). The court then decided that *if the question of gang membership became relevant,* Randall Quan was in a position to offer his opinion on whether the defendant or others were members of the Wah Ching Gang. But the court concluded that such testimony would be relevant "only if the occasion arises." The court ruled that based on the evidence adduced, and which the prosecution claimed it could adduce, that membership in the Wah Ching Gang was inadmissible. The court added:

> "I'm not foreclsoing you, however, from presenting evidence of gang membership if the occasion should arise, such as - - the only instance I would assume that might be admissible is, for instance, if a member of the gang testifies and testifies in a way to corroborate the defendant's story, the defendant's testimony, because I think that there is a motive on the part of that gang member to help his friends, a gang member, and it's material and relevant . . . at this stage of the evidence. I do feel that it would not be appropriate. I do feel that it would be a basis for a reversal, especially if it ends up that the matter is a close case." (R.T. 560-61.)

The court admonished the prosecutor: "Before you do direct a question to the defendant with reference to membership in this particular gang, Wah Ching, or any other gang, *ask to*

approach the bench or make your offer of proof and indicate what you plan to do in that regard." (R.T. 562. Emphasis supplied.)

The following significant exchange terminated the hearing:

> "THE COURT: Yes. No question about his membership. In other words, do not question him about the membership in any gang at this stage.
>
> "MR. FOX: *May I ask questions concerning familiarity with any individuals who he knows to be members of Wah Ching?*
>
> *"THE COURT: No. I don't see any relevance at this point. I think that would be the same thing. In other words, if they belong together - -*
>
> *"MR. FOX: I understand what the court's analysis is and I will proceed in that manner.*" (R.T. 564-65. Emphasis supplied.)

A little later in the cross-examination of the defendant, the prosecutor marked for identification a folder containing six photographs of Orientals (People's 13) and showed it to the defendant. He was asked whether there was a picture of Edward Kwan in the group and the defendant answered "Yes." He then put his initials by the number corresponding to Mr. Kwan's picture. Then followed the next bombshell:

> "Q. BY MR. FOX: Is Edward Kwan a member of Wah Ching?
>
> "MR. WEIT: Objection, Your Honor. May we approach the bench?" (R.T. 635-36.)

At the bench the following dialogue ensued:

> "THE COURT: Mr. Fox, I told you that before you made any reference to Wah Ching, you should advise the Court that you are intending to do so. If there is some objection I'd hear it and make a ruling before that matter was presented.

"MR. FOX: Then I misunderstood the Court. My understanding was I was not to ask him concerning any of his affiliations or membership.

"THE COURT: I don't want any reference to Wah Ching unless I ruled that it's admissible.

"MR. FOX: I apologize to the Court.

"MR. WEIT: This is the second time that has come up. It was inflammatory the first time. Certainly it is inflammatory the second time. I think I would be entitled to make a motion for dismissal at this point on the basis of prosecutorial misconduct.

"THE COURT: Are you making a motion for mistrial?

"MR. WEIT: Yes, I suppose I should, Your Honor.

"THE COURT: Well, your motion for dismissal -- I'M saying are you making a motion for mistrial. Did you misspeak?

"MR. WEIT: Yes, Your Honor, I did.

"THE COURT: Motion is denied. All right. Again, to be perfectly clear, any time you get ready to ask anything about Wah Ching, unless it's brought up by some witnesses's testimony, defense witnesses, then you ask to approach the bench and make an offer of proof, and I will make a ruling." (R.T. 637-38.)

Again, the prosecution sought to justify eliciting Wah Ching membership , but the court responded:

"THE COURT: The objection is sustained. Do not make any reference to Wah Ching based on the evidence that's been presented at this point. Again, if you intend to make reference to Wah Ching, I will hear your offer of proof as the occasion develops." (R.T. 638-39.)

Cross-examination continued anew with the court omitting to inform the jury of its ruling or defense counsel's objection (R.T. 640).

In his closing arguments, the prosecutor took full advantage of his previous misconduct. He spoke of his

difficulties sleeping the night before giving his summation, due to his thoughts about the pictures of Ralph Chew, both alive and dead. He characterized him as a human being who was "living, breathing, and in this particular case he was contributing during the course of his 37 years of life" (R.T. 761). The clear insinuation was that the defendant and his friend were gang members who did not work and were social liabilities best taken off the street. He spoke of the defendant's intentional act being committed not only against society "but to a wife and mother and children, without any reason to think that the defendant even suspected the deceased had a wife or children" (*ibid*). After all he was only seen drunk in the company of officer Bontempo. His wife had been ordered home earlier in the evening. He also emphasized that the defendant's friends did not show up to corroborate his version of the events, although, as will shortly be made clear, the prosecution sought to bring only one of them into court and then pursuant to a fraudulent subpoena which resulted in the witness Edward Kwan being illegally jailed for two days (R.T. 774-857).

Finally, the prosecutor fully capitalized on the way he had misconducted the case and the presumed integrity of his own office. He told the jury, "I have some impressions about Mr. Tong and his three friends; however, those impressions are not evidence in this case" (R.T. 781). That, of course, was the old "if you only knew what I know, but I am not legally permitted to tell you" argument. And in this case it certainly caused the jury to reflect back on his claims

of gang activity.

And the prosecutor left the jury with one more choice morsel:

> "He didn't like Ralph Chew. Why didn't he like Ralph Chew? I have some feelings. I have some reactions about it. Ralph Chew was married to a young lady who was Caucasian. Ralph Chew was associating in the Lee Terrace Bar with Caucasions." (R.T. 783

How low and misleading can one get. The only evidence of racism was the testimony of one of Ralph Chew's friends that he was hurling racist epithets at the defendant and that *the defendant* was hurt by it, not *vice versa* (R.T. 175-76). Furthermore, Ralph Chew's wife was at home when these events transpired, not in the Lee Terrace Bar. The defendant had no reason to believe that Chew was married to a Caucasian, or anyone for that matter.

The final example of the prosecutorial misconduct is unique in that it was not the misconduct *per se* which defines the limits of the harm done but, rather, the proceedings which transpired because of it. Also, it requires an organizational quirk, because it is necessary to retrace our steps a bit in order to comprehend what happened after jury deliberations began. Also, an additional legal violation resulted from the following events which is not even predicated on prosecutorial misconduct.

As we know, after the prosecution had rested its case-in-chief and during the defendant's testimony, a protracted hearing was held under Section 402 of the Evidence Code, outside the presence of the jury, addressing the subject of whether the prosecution could question the defendant about his alleged

affiliation with the Wah Ching Gang or its members (R.T. 474-80, 482-565; C.T. 24). As noted previously, such a hearing came on the heels of the prosecutor's question in the presence of the jury asking the defendant whether he was a member of the Wah Ching (R.T. 474). At the culmination of the hearing the prosecutor introduced the following topic:

> "MR. FOX: Before the court leaves the bench, I'm going to request to provide the court with a notice of a subpoena of an Edward Kwan dated April 23, 1981. I would further point out to the court that, in fact, the officer who contacted him today indicated or requested him to be present in court at 2:00 p.m.
>
> "THE COURT: That is the subpoena with a return service?
>
> "MR. FOX: Correct, Your Honor. He has failed to acknowledge either the subpoena or the personal request.
>
> "THE COURT: Upon presentation to the clerk of the return of service properly signed on the subpoena, a body attachment is to issue for the immediate apprehension of the defaulter. I should say an attachment for the defaulter. No bail.
>
> "Now, Mr. Fox, you can get a copy of that body attachment and get it to your investigating officer and it can be made today.
>
> "MR. FOX: Yes, Your Honor.
>
> "THE COURT: You can go and pick him up and bring him in tomorrow morning. No bail." (R.T. 566; C.T. 24.)

On May 1, 1981, the jury was instructed and, because it was Friday afternoon and a juror had a commitment to catch a plane, the jury was dismissed for the week end and the commencement of their deliberations was scheduled for Monday, May 4, 1981 at 9:30 a.m. After the jury was excused, the "defaulting witness," Edward Kwan, was surrendered to the court and questioned under oath with an interpreter sworn to

assist him (R.T. 843; C.T. 27). Mr. Kwan testified that he had not been served with a subpoena, so the court made the following inquiry:

> "THE COURT: Mr. Fox, this witness was a witness that you indicated had been served.
> "MR. FOX: That's correct, Your Honor.
> "THE COURT: Who conducted -- who was the server or the processor?
> "MR. FOX: An Asian Task Force Officer personally handed the subpoena to the witness, Your Honor." (R.T. 844.)

The court then stated that the officer who served the subpoena should come to court to testify to that fact, that the court intended to conduct a contempt hearing and that Mr. Kwan would require a lawyer. The District Attorney stated that he would have his witness present on Monday. Again, the court inquired of the witness whether he denied receiving the subpoena and he categorically stated that he did not. The court, nevertheless, with no evidence to the contrary, disbelieved Mr. Kwan, acknowledged his indigence, appointed an attorney to represent him, slated a hearing for the next Tuesday and ordered Mr. Kwan taken into custody unless he, despite his indigence, could post $500 bail. The prospective witness went to jail (R.T. 844-47).

On Monday, May 5th, the court related to counsel that he had spoken to one of the jurors on the phone that morning and she had suffered injuries during a clash between her bicycle and another person's car and, if she was unable to join the remaining jurors during the deliberations that afternoon, she would be replaced by an alternate. That afternoon, counsel and jury were informed that the court had not heard from the

missing juror and, after a brief colloquy, the matter was continued until the next morning with the understanding that if the missing juror was unable to attend and deliberate, she would be replaced by the alternate (R.T. 846-47; C.T. 28).

On Tuesday, May 5th, the court conducted proceedings out of the presence of the jury, *but in the presence of the alternate*. The court explained that the missing juror was still physically unable to attend and that he was going to replace her with the alternate. Before swearing in the alternate who would participate in the entire deliberative process with the other eleven jurors, the court stated in her presence that it was going to conduct contempt proceedings against the defaulting witness, Mr. Kwan.

The prosecution then called Ross T. Arai to the stand and he explained that he was a police officer for the City of Los Angeles working the Asian Task Force. He identified the defendant's friend, Edward Kwan, and stated that he was requested to serve a subpoena on him on April 23rd and that he went to Mr. Kwan's father's sewing shop expecting to find Mr. Kwan there. He was not there and the officer talked to his father and sister and requested his father to give the subpoena to Mr. Kwan. His father signed the subpoena and accepted it. The officer then testified that on April 28th he was asked to locate Mr. Kwan and obtain his attendance in court. He went to the Tai Hong Restaurant in Chinatown where he expected to find him and saw him seated at a table with four other persons. The officer asked Mr. Kwan whether he received the subpoena and was told that he did and that Mr. Kwan should be in court at 2:00 that afternoon, and Mr.

Kwan agreed to be in court at that time. He said that he would come to court with his friends, one of whom seated with him was the defendant. The officer further testified that he conversed with Mr. Kwan in English and that he (the officer) did not speak Chinese.

On cross-examination by Mr. Kwan's attorney, it was pointed out that the subpoena which was never even served on Mr. Kwan called for him to appear on April 22nd, one day *before* his father ever saw the subpoena. The court exonerated the witness of contempt, naturally, because he received a secondhand late subpoena, but he spent two days in jail because of it (R.T. 849-57; C.T. 29).

The jury was then called into the courtroom, and Mrs. Stich, the alternate juror, was installed as a regular juror. The new jury then began to deliberate. (R.T. 857-58; C.T. 29.)

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Riverside)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Riverside, California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 11150 Spanish Hills, Post Office Box 626, Corona, California 91720, that on JULY 25, 1983, I served the within PETITION FOR WRIT OF CERTIORARI to the Court of Appeal of the State of California, Second Appellate District, on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Corona, County of Riverside, State of California.

Attorney General, State of California
3580 Wilshire Boulevard
Los Angeles, California 90010 (3 copies)

District Attorney, County of Los Angeles
210 West Temple Street
Los Angeles, California 90012 (1 copy)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JULY 25, 1983, at CORONA, CALIFORNIA.

D. A. Standefer

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